

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
AT WINCHESTER

ROY E. CUNNINGHAM, ANNA B.)	
CUNNINGHAM,)	
)	
Plaintiffs,)	
)	Case No. 4:01-cv-36
v.)	
)	
AMSOUTH BANK, N.A.,)	
)	
Intervenor Plaintiff,)	
)	
v.)	Chief U.S. Judge Curtis L. Collier
)	
UNITED STATES OF AMERICA,)	
)	
Defendant)	

MEMORANDUM AND ORDER

The Court deems it necessary to set this case for a firm trial date so the Court sets this case for trial before the undersigned on Monday, June 30, 2008 at 9:00 a.m.

On March 17, 2008, this Court held a status/scheduling conference (Court File No. 182). Plaintiff Anna Cunningham did not attend, but later contacted the Court indicating she had mistakenly gone to the Hamilton County Courthouse rather than the Joel W. Solomon Federal Building. At the conference it became apparent there was no other pretrial matters to complete. Counsel Joseph Edwards for Intervenor Plaintiff AmSouth indicated AmSouth had a pending motion to dismiss, which had never been ruled on. But the Court can find no such motion. AmSouth has made several motions to dismiss all of which were denied, albeit not on the merits. There are no pending motions on the docket.

Through no fault of anyone this case has not progressed to conclusion in a timely manner.

This case has been pending on the docket for some time and it is now time to move it to a conclusion. The case dates back to February 27, 1997, when Plaintiff Roy E. Cunningham (“Plaintiff”) went to the Veteran’s Hospital in Murfreesboro, Tennessee, in order to undergo a cerebral arteriogram (Court File No. 1 “Complaint”). According to the Complaint, physicians and employees of Defendant provided care negligently and as a result Plaintiff is in a total and complete vegetative state (*Id.* at 6-7). This lawsuit was brought by Plaintiff’s wife Anna B. Cunningham in April 2001 (Complaint).

Defendant United States of America (“Defendant”) answered and substantially agreed Plaintiff existed in a vegetative state, but denied any negligence on the part of its employees and pleaded several affirmative defenses (Court File No. 5).

The case was assigned to the Honorable R. Allan Edgar and scheduled for trial on April 21, 2003 (Court File No. 16). The parties then conducted active discovery and on March 6, 2003 the court rescheduled the trial for September 16, 2003 (Court File No. 41). The Plaintiffs’ filed a motion for additional time to disclose experts and the parties filed a joint motion to extend discovery and the trial date (*id.*). On April 10, 2003, this case was reassigned to the Honorable James H. Jarvis (Court File No. 43). The trial was again rescheduled for October 15, 2003 (Court File No. 45). The parties continued to conduct active discovery according to a revised discovery plan (Court File No. 47).

The parties filed proposed findings of fact and conclusions of law as required under the scheduling order (Court File Nos. 49, 50). The trial was again rescheduled for December 1, 2003 (See Docket after Court File No. 50). In October, a final pretrial order was entered by Judge Jarvis (Court File No. 51). But the trial was again rescheduled for March 8, 2004 (See Docket after Court

File No. 51).

AmSouth Bank, N.A. (“AmSouth”) then filed a motion to intervene in January 2004 (Court File No. 55). Apparently, Plaintiff’s wife failed to file appropriate accountings with the Veterans Administration (“VA”), and the VA began making benefits payments to AmSouth bank instead (*id.*). Upon the request of the VA, AmSouth then petitioned to be named legal guardian over Plaintiff (Court File No. 60, Ex. B). The Probate Court for Coffee County, Tennessee appointed AmSouth legal guardian of Plaintiff, but appointed Anna B. Cunningham guardian of the person (Court File No. 52, Ex. 1). The court granted AmSouth’s motion to intervene on February 12, 2004 about a month prior to the trial date (Court File No. 67).

AmSouth then filed a motion to continue the trial on March 1, 2004 (Court File No. 74). The trial was continued over the objection of Anna B. Cunningham (Court File No. 76). The trial was reset for August 23, 2004 (See Docket after Court File No. 76). Discovery continued and in June 2004, AmSouth moved to dismiss this action without prejudice (Court File No. 103), and the parties filed a joint motion to continue trial (Court File No. 117). The court granted this motion to continue and reset the trial for June 13, 2005 (Court File No. 120; see Docket notice after Court File No. 120). The court had previously denied AmSouth’s motion to dismiss (Court File No. 119). Again, discovery continued.

At this point Plaintiff recovered to some extent and was no longer living in a vegetative state (Court File No. 128). Apparently, Plaintiff could now communicate through movement of the eyes, a downward movement signifies “no,” while an upward movement with lid elevation signifies “yes.” (Court File No. 135). AmSouth then filed a renewed motion to dismiss because the Tennessee Court of Appeals did not issue a stay pending Anna B. Cunningham’s appeal of the order establishing

AmSouth as Plaintiff's legal guardian (Court File No. 140). AmSouth attached a court order from the Chancery Court of Coffee County, which ordered both that AmSouth was the legal guardian of Plaintiff, and that AmSouth "shall have exclusive control of Plaintiff's interest in the litigation currently pending in United States District Court for the Eastern District of Tennessee, Winchester Division, *Roy E. Cunningham, et al, v. United States of America*, case number 4:01-cv-36." (*Id.*, Ex. 1). Anna Cunningham responded to the motion to dismiss arguing AmSouth had breached its fiduciary duties and she had a motion pending in Probate Court to remove AmSouth as Plaintiff's guardian (Court File No. 147). Judge Jarvis denied AmSouth's motion to dismiss holding "AmSouth may renew its motion to dismiss once the state courts of Tennessee have finally and definitively ruled upon the question of the proper guardian for Roy E. Cunningham." (Court File No. 150).

While pretrial motions were pending, once again the parties jointly moved for a continuance (Court File No. 160). The basis of the motion was the guardianship of Plaintiff had not been finally settled by the state courts, because Anna B. Cunningham had appealed the adverse ruling in Chancery Court. The trial was rescheduled to March 13, 2006 (see Docket after Court File No. 161)

The docket indicates Anna Cunningham attempted to continue discovery, but the Court stayed discovery pending a ruling of the Tennessee Court of Appeals (Court File Nos. 165-70). No further activity occurred in this case until June 21, 2007 when the case was reassigned to Judge Harry S. Mattice (Court File No. 172). Judge Mattice recused himself and the case was assigned to Chief Judge Curtis L. Collier (Court File Nos. 173-74). Anna B. Cunningham's counsel then moved to withdraw because of a conflict with their client (Court File No. 175). Magistrate Judge William B. Mitchell Carter granted the motion to withdraw, and ordered Anna B. Cunningham to

inform the Court on or before January 28, 2008 whether she had new counsel or will be representing herself (Court File No. 181).

This case will go to trial in its present posture. No ruling on the merits previously issued by District Judges Jarvis or Edgar will be revisited. There is nothing in the record to indicate any change in the status of AmSouth as Plaintiff's guardian ad litem, and therefore AmSouth will represent Plaintiff's interest in this case.¹ This case has been pending on the docket of the Eastern District of Tennessee for seven years, no further continuances shall be granted absent extraordinary circumstances.

It is **ORDERED** this matter is **RESET** before a United States District Judge and jury on **Monday, June 30, 2008**, in the third floor courtroom, 900 Georgia Avenue, Chattanooga, Tennessee. The parties shall be prepared to commence trial at **9:00 a.m.** on the date which has been assigned. If this case is not heard at 9:00 a.m. on the date assigned, it will be held in line pending notification from the Court. The final pretrial conference is reset for Friday, June 13, 2008 at 2:30 p.m.

SO ORDERED.

ENTERED:

/s/
CURTIS L. COLLIER
CHIEF UNITED STATES DISTRICT JUDGE

¹The only information the Court can garner on the state case the Tennessee Court of Appeals remanded the matter to the Probate Court for an evidentiary hearing. *AmSouth Bank v. Cunningham*, No. M2004-02376-COA-R3-CV, 2006 WL 468718 (Tenn. Ct. App. Feb. 27, 2006).